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From Technocrat to Democrat

Cass R. Sunstein *

Abstract

There is an epistemic argument for judicial deference to the decisions of administrative agencies and legislatures: courts do not have easy access to relevant information, and they should defer to those who do. People who are steeped in technical issues, and alert to the importance of those issues, might well be inclined to embrace judicial modesty. In administrative law, then-Professor Stephen Breyer pioneered the view that judge-made doctrines reflect unarticulated assumptions about regulatory policy, and he urged that such doctrines could not be evaluated without a sense of the underlying substance and the likely human consequences. In light of the complexity of the substance, Breyer argued for a degree of modesty. On the Supreme Court, Justice Breyer has often embraced judicial modesty as well, emphasizing the importance and relevance of complex judgments of fact (sometimes with the aid of what we might call “the Breyer Appendix”). The principal qualification is his insistence on reasoned decision making, which he appears to regard as a quid pro quo for deference, as an aspect of the rule of law, and as an indispensable check on arbitrariness.

As a law professor, Justice Breyer’s field was administrative law, where his most important contribution was to challenge the view that the exclusive focus of the field should be on judicial review of agency action. On Breyer’s account, it is not possible to understand what agencies do, or to evaluate judicial judgments, without having some sense of the substance of regulatory policy as well.¹ It is not easy to overstate the importance of this claim, which has transformed a once-arid field.

Breyer’s great casebook, written with Richard Stewart, is pointedly called not Administrative Law, but Administrative Law and Regulatory Policy.² Originally

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¹ This view permeates STEPHEN BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY (1979).

² BREYER & STEWART, *supra* note. Full disclosure: As a research assistant for Professor Stewart, I worked on the book in the late 1970s, and along with Michael Herz and Adrian Vermeule, I am a coeditor of the current edition.

published in 1979, it lived up to its title. In area after area, the casebook attempted to inform judicial decisions with materials on the substantive problems involved. It pointedly suggested that such decisions cannot be understood in a policy vacuum, and that beneath seemingly dry debates about doctrine, courts were often making controversial assumptions about complex questions of policy and about the human consequences of alternative courses of action. A careful reader of the casebook might well conclude that those who understand the substance will be inclined to take a significantly more cautious approach to review by generalist judges, who should afford specialized agencies a large measure of respect.

It is fair to say that as a law professor, Breyer ushered administrative law into the modern era. It is also fair to say that because of his insistence on the importance and relevance of substantive questions, he called for a heightened degree of judicial deference to democratic processes.³ In administrative law, he was both a technocrat and a democrat (in the sense of an advocate for judicial modesty). Indeed, he was a democrat in significant part *because* he was a technocrat. This form of judicial humility emerged from Breyer's brand of pragmatism, not from abstractions or high-flown theory.

To be sure, there are multiple potential tensions between a belief in technocracy and a belief in democracy. Those tensions lie at the heart of contemporary administrative law (and in a sense public law more generally). Technocrats are enthusiastic about a large role for insulated, independent experts, immersed in complex questions. Democrats are concerned that such experts lack accountability and may have an agenda of their own. If we are concerned about fidelity to popular will, we might not be so enthusiastic about insulated experts. The potential tension might be defused in various ways, perhaps by ensuring ultimate accountability for judgments of policy while creating procedural safeguards designed to ensure that technical expertise is in fact being deployed.⁴

I am bracketing those larger questions here. What I seek to emphasize is that if the question is judicial review of regulations and statutes, courts might opt for modesty in large part because of an awareness of what judges are unlikely to know. This argument for modesty offers one reason why a judge with technocratic inclinations might well be a democrat.⁵

In my view, Breyer's academic writing, with its close attention to regulatory substance, much helps to explain his work on the Supreme Court. His general respect for democratic judgments is, in significant part, epistemic; it stems from an emphasis on the importance of the consequences, on the impossibility of evaluating doctrine without a

³ Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

⁴ Some of these issues are addressed in Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

⁵ Stephen Breyer, *ACTIVE LIBERTY* (2006), offers a host of reasons, as well as a distinctive understanding of democratic ideals, but I believe that the epistemic strand in his work deserves particular emphasis.

sense of those consequences, and on an insistent recognition of what judges do not know. There is a lesson here about what makes Justice Breyer's work distinctive, even unique. We might speak here of "the Breyer Appendix," a worthy successor to the Brandeis Brief, in which Justice Breyer accompanies his opinions with an appendix citing a range of technical materials.⁶

There is also a lesson about the possibility of a distinctly epistemic argument for judicial deference, one that involves the limits of judicial knowledge of fact, and that (in my view) deserves a far larger role in constitutional law and jurisprudence than it now occupies.⁷ This argument is very different from those of Justice Oliver Wendell Holmes, captured in his famous words: "If my fellow citizens want to go to Hell, I will help them. It's my job."⁸ Breyer is also interested in judicial humility, but not at all because he wants to assist his fellow citizens in going to Hell. On the contrary, his belief in humility is rooted in a belief that good outcomes are more likely if judges play a modest role in the constitutional order.

We can find the core of the idea in his short essay on the *Vermont Yankee* case, which repays careful reading, even though it was published over twenty-five years ago.⁹ Breyer wrote in the midst of a heated doctrinal debate over whether courts should be allowed to require agencies to adopt more procedures than the Administrative Procedure Act mandates.¹⁰ Characteristically, and somewhat oddly for the time, Breyer stepped back from the narrow doctrinal debates and asked more broadly about the role of the courts in the controversy over nuclear power. He objected that judges are "intruding too deeply upon the administrative process, perhaps without full realization of their implicit premises or of the potential consequences."¹¹ In making this argument, he emphasized the importance of "the 'substantive' issues in the case," which he engaged in detail.¹² In good realist fashion, he suggested that "in practice, the reviewing standards courts apply often reflect unarticulated assumptions about, or attitudes toward, the substantive aspects of the subject matter being reviewed."¹³

⁶ See, e.g., *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. 2729, 2771–79 (2011) (Breyer, J., dissenting); *Eldred v. Ashcroft*, 537 U.S. 186, 267–69 (2003) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 631–44 (1995) (Breyer, J., dissenting); *Rubin v. United States*, 525 U.S. 990, 996 (1998) (Breyer, J. dissenting from denial of certiorari).

⁷ The closest account may be ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

⁸ Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

⁹ See Breyer, *supra* note.

¹⁰ See Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978); Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978).

¹¹ Breyer, *supra* note, at 1833.

¹² *Id.* at 1833.

¹³ *Id.*

Steeping himself in that substance, he insisted that “potentially adverse health, safety, or environmental effects lie not on one side, but on all sides, of the nuclear power issue.”¹⁴ It followed that “application of a more stringent standard of review means delay and favors the status quo,” with delay turning out not to be irrelevant or innocuous, but significantly affecting “the outcome of the energy debate.”¹⁵ In the 1970s, federal courts had treated nuclear power as posing unique dangers, but the “most recent comparison of the health and safety effects of coal and nuclear energy suggests that coal plants are likely to cause seven to twelve times as many deaths as nuclear plants, and four to six times as much sickness and injury.”¹⁶ In what may well be the first prominent reference to climate change in the legal literature, he added that reliance on coal “could aggravate the ‘greenhouse effect,’ whereby excess carbon dioxide (which accompanies coal burning) traps heat inside the earth’s atmosphere, thus possibly melting the icecaps and raising the level of the oceans.”¹⁷ With these points, Breyer drew attention to the problem of “health-health tradeoffs” and its relationship to administrative law.¹⁸

Breyer also explored the consequences of court-imposed delays, which, he said, “are not ‘neutral.’ They affect the decisionmaking process, tending to move the decisions of those who actually build power plants in the direction of coal, which may well prove more hazardous and environmentally destructive than nuclear plants.”¹⁹ This point was poorly understood at the time, and it is not sufficiently appreciated today, because those who stress doctrinal requirements, and the importance of judicial safeguards, tend to miss the systemic effects of judicial invalidations and remands.²⁰ Breyer’s support for the Court’s conclusion in *Vermont Yankee* was based on his judgment, rooted in a sense of the likely consequences, that courts “should play a limited role, affecting as little as possible the outcome of that debate. Judges, after all, are neither elected representatives nor experts in energy technology.”²¹

It is revealing that Breyer’s principal academic writings in the general area of administrative law deal with substance and real-world effects, not procedure and doctrine. *Regulation and its Reform*²² emphasizes the need to “match” market failures (such as externalities) with particular tools (such as Pigouvian taxes); it contends that a principal source of regulatory problems is “mismatch” between failure and tool. With that claim, the book helped to reorient administrative law teachers from their standard

¹⁴ *Id.* at 1835.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1836.

¹⁸ For a general discussion, see Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996).

¹⁹ Breyer, *supra* note, at 1840.

²⁰ A classic treatment is JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

²¹ Breyer, *supra* note, at 1845.

²² STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

preoccupation with the appropriate intensity of judicial review. In *Breaking the Vicious Circle*, Breyer contends that the United States government devotes excessive resources to small problems and insufficient resources to large ones.²³ He argues that a cadre of experts, schooled in technical matters, should have the authority to ensure that scarce dollars are doing the most good.²⁴

These books do not much engage the question of the judicial role, but they have a great deal of continuity with Justice Breyer's opinions on the Court, which also emphasize the importance of facts and the human consequences. His frequent votes in favor of validating the outcomes of democratic processes, resisting occasional trends toward heightened judicial scrutiny,²⁵ reflect the epistemic case for judicial modesty.

I will offer some details shortly, but we should begin with an obvious puzzle. One might expect that Justice Breyer would be the Court's most enthusiastic defender of the *Chevron* principle, which requires courts to uphold reasonable agency interpretations of law in the face of statutory ambiguity.²⁶ One defense of *Chevron* is precisely that agencies have technical expertise and should be allowed to apply that expertise to resolve ambiguities.²⁷ Perhaps surprisingly, Justice Breyer has, in fact, been the Court's most consistent critic of *Chevron*, contending that its approach is far too simple and rule-like, and that the appropriate degree of deference should turn on a multifactor balancing test.²⁸ Is it possible to square his skepticism about *Chevron* with his embrace of judicial modesty?

For two reasons, I believe that it is. First, Justice Breyer wholeheartedly embraces *Chevron* when technical expertise is involved,²⁹ in the sense that it bears on resolution of statutory ambiguities. For this reason, he embeds a recognition of technical expertise into his preferred framework -- though in my view, his call for a multifactor test produces undue complexity in the law and creates a risk of judicial overreaching.³⁰ But second, and more importantly, Justice Breyer has been found, in a large data set, to be the

²³ STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993).

²⁴ *Id.* at.

²⁵ See *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. 2729, 2761 (2011) (Breyer, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 616 (1995) (Breyer, J., dissenting).

²⁶ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁷ The Court referred to that point in *Chevron* itself. *Id.* at 865.

²⁸ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). The same essential view can be found in *Barnhart v. Walton*, 535 U.S. 212 (2002), as well as Justice Breyer's concurring opinion in *City of Arlington v. F.C.C.*, 133 S.Ct. 1863, 1875 (2013) (Breyer, J., concurring in part and concurring in the judgment).

²⁹ See Breyer, *supra* note.

³⁰ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 247–49 (2006).

most deferential justice on the Court.³¹ Ironical but true: the Court's most vocal critic of a strong reading of *Chevron* is the most deferential Justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential.³²

More particularly, Justice Breyer voted to uphold agency interpretations 82 percent of the time, whereas Justice Scalia did so merely 52 percent of the time.³³ Also remarkably, Justice Breyer's validation votes did not depend on whether the sitting President is Republican or Democratic.³⁴ He voted to uphold the interpretations of Republican administrations 80 percent of the time – and thus showed no statistically significant difference between Republican and Democratic administrations.³⁵ By contrast, Justice Scalia voted to uphold the interpretations of Republican administrations 60.5 percent of the time but Democratic administrations just 42 percent of the time – a striking difference.³⁶

If we put the numbers to one side and investigate Justice Breyer's opinions, we will see that he is often concerned to investigate and to muster facts, sometimes appearing in the body of his opinions, sometimes appearing in technical appendices. Who else, for example, would write the following sentence: "With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games."³⁷ It is noteworthy that the two appendixes come in an opinion calling for judicial deference to a legislative decision to prohibit the sale or rental of violent video games to minors.³⁸ In arguing for such deference, Justice Breyer emphasized that many or most of the peer-reviewed "articles were available to the California Legislature or the parties in briefing this case. . . . And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment's continuing validity."³⁹

The modern era of occasional judicial scrutiny of congressional authority began with *United States v. Lopez*,⁴⁰ where the Court struck down the Gun-Free School Zones Act. In his dissenting opinion, Justice Breyer placed a great deal of emphasis on the

³¹ Thomas Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006). This data set includes all relevant decisions from 1989 through 1995. To be sure, it would be most valuable to examine the evidence to the present day.

³² *Id.* at 832 tbl.1.

³³ *Id.*

³⁴ *Id.* at 874 app. tbl.1.

³⁵ *Id.*

³⁶ *Id.* at 833, 879 app. tbl.1.

³⁷ *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

³⁸ *See id.* at 2770.

³⁹ *Id.* at 2772.

⁴⁰ 514 U.S. 549 (1995).

facts, contending, “Numerous reports and studies—generated both inside and outside government—make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.”⁴¹ Among other things, he pointed to “evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education,”⁴² and that “a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied.”⁴³ He also offered a lengthy appendix, complete with a list of congressional materials, other materials from the federal government, and a host of associated writing, with empirical papers from the *American Economic Review*, the *Journal of Political Economy*, the *Review of Economics and Statistics*, and the *Journal of the American Medical Association*.⁴⁴

In the area of “substantial evidence” review, the Court’s most important opinion in recent decades is *Allentown Mack Sales and Services, Inc. v. NLRB*,⁴⁵ where the majority gave unusually careful scrutiny to a decision of the National Labor Relations Board, striking it down for lack of sufficient evidentiary support. In dissent, Justice Breyer made a characteristic set of objections, emphasizing agency expertise and contending that “words of a technical sort that the Board has used in hundreds of opinions . . . have suddenly disappeared, leaving in their place what looks like an ordinary jury standard that might reflect, not an agency’s specialized knowledge of the workplace, but a court’s common understanding of human psychology.”⁴⁶ Stressing the agency’s “accumulated expertise,”⁴⁷ he objected that the majority had substituted “its own judgment for that of the Board and the ALJ in respect to such detailed workplace-related matters.”⁴⁸

Justice Breyer offered closely related arguments in *FDA v. Brown & Williamson Tobacco Corp.*,⁴⁹ in which he dissented from the Court’s decision to invalidate the FDA’s assertion of authority over tobacco products. In explaining his dissent, he drew attention to the agency’s “broad jurisdictional authority”⁵⁰ and pointed to changing understandings of facts over time: he noted that “such a statutory delegation of power could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected. Such a possibility is inherent in the very nature of a broad delegation.”⁵¹

⁴¹ *Id.* at 619 (Breyer, J., dissenting).

⁴² *Id.* at 621.

⁴³ *Id.* at 622–23.

⁴⁴ *Id.* at 636–44.

⁴⁵ 522 U.S. 359 (1998).

⁴⁶ *Id.* at 390 (Breyer, J., concurring in part and dissenting in part).

⁴⁷ *Id.* at 393.

⁴⁸ *Id.* at 394.

⁴⁹ 529 U.S. 120 (2000).

⁵⁰ *Id.* at 165 (Breyer, J., dissenting).

⁵¹ *Id.* at 166.

But there is an important exception to Justice Breyer's usual posture of deference, and it involves the duty of reasoned decision making. He appears to find that duty to be part of the rule of law, and he insists on its exercise as a kind of quid pro quo for deference. We can find the central idea in his relatively rare votes to strike down acts of Congress and also to invalidate federal regulations.

Consider, for example, Justice Breyer's dissenting opinion from the Court's decision to uphold Congress' twenty-year extension of the copyright term.⁵² He emphasized not only that this was "the longest blanket extension since the Nation's founding," but more fundamentally its "practical effect," which is to inhibit rather than to promote the progress of science.⁵³ In explaining this conclusion, Justice Breyer offered a technical appendix, relying on a brief from economist George Akerlof and his coauthors to support the view that his "text's estimates of the economic value of 1998 Act copyrights relative to the economic value of a perpetual copyright, as well as the incremental value of a 20-year extension of a 75-year term, rest upon the conservative future value and discount rate assumptions set forth in the brief of economist amici."⁵⁴

Insistence on the duty of reasoned decision making also helps to account for Justice Breyer's refusal to join the majority opinion upholding the FCC's change in its policy with respect to the use of "fleeting expletives" on the airwaves. In *FCC v. Fox Television Stations, Inc.*,⁵⁵ his objection was simply that the FCC did not give a sufficient explanation for its change, which would allow it to punish stations for allowing such expletives. In his view, the agency's explanation lacked "empirical or other information" to justify its new conclusion.⁵⁶ Invoking the requirement of reasoned decision making, he suggested that "FCC's answer to the question, 'Why change?' is, 'We like the new policy better.' This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient."⁵⁷

The most important point here is that an agency may not defend its policy simply by asserting its preference. It has to offer reasons. To be sure, there is a risk that a judicial demand for reasoned decision making will serve, in practice, as a judicial demand for reasons with which judges agree. In *FCC v. Fox Television*, the FCC did not merely assert its preferences; it attempted to explain them, and for that reason, there is a strong argument that the majority was right.⁵⁸ Nonetheless, a requirement of reason-

⁵² *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting).

⁵³ *Id.* at 243.

⁵⁴ *Id.* at 267.

⁵⁵ 556 U.S. 502 (2009).

⁵⁶ *Id.* at 567 (Breyer, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.* at 517–18 (majority opinion) (citing *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005*, 21 FCC Rcd. 13299 (2006)) (cataloguing the FCC's justifications for its decision).

giving can be seen as an effort to ensure that technical expertise is in fact being applied, and that agencies are not merely bowing to political winds.⁵⁹

Justice Breyer has been on the Court for over a quarter-century. In that period, his thinking has not so much changed as broadened. Once focused principally on administrative law and regulatory policy, he is now concerned with issues of constitutional theory and self-governance. But he continues to emphasize the importance of immersion in the facts; he continues to defend a modest judicial role. More than any Justice in the Court's history, he remains a technocrat, and he is a democrat, emphasizing the importance of judicial humility, in part for that reason.

Let's allow him the final words (and note the contrast with Holmes' very different suggestion about where he would help his fellow citizens to go): "I suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government."⁶⁰

⁵⁹ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

⁶⁰ STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW*, at xiv (2010).